



Pre-Marital Agreements

This note gives an overview of what "Pre-Nups" are, and the practicalities involved in obtaining one.

Many clients are now seeking advice before they marry about whether there are steps they could take to protect their assets in the event of future separation, and an increasing number are signing Pre-Marital Agreements. There have in recent years been both legal and social changes which are making these agreements more common in the UK.

For those who do not want to go as far as a Pre-Marital Agreement, there are other legal steps that should be considered on marriage, or when assets are inherited and they are also explained below.

What is a Pre-Nup?

A Pre-Marital Agreement ("PMA") is a document entered into before marriage with the primary objective of influencing the terms of a financial settlement in the event of future divorce.

A PMA can also be used to agree how property should be held during marriage, and to express intentions about how property will be divided in the event of the death of a spouse.

Are Pre-Nups binding in England?

A PMA is not a binding contract. Under English law, in the event of divorce proceedings, the court retains discretion and power to impose a financial settlement dividing assets on divorce, and a PMA cannot override the court's ultimate discretion.

However, there is now a presumption that PMAs will be upheld on divorce provided that certain formalities are complied with, and provided also that both parties' financial needs are met in the divorce settlement.

A PMA is unlikely to be followed on divorce if the assets are modest, because the assets and income that are available will be required to meet needs, particularly the needs of children. Where the assets are substantial, and there is a surplus of assets above the resources required to meet needs, the terms of the PMA are likely to be followed.

What has changed to make people want these agreements?

Financial settlements on divorce have become more expensive for the spouse in the stronger financial position in the last ten years. Two trends have caused this inflation:

- (a) The starting point of an equal division of capital and
- (b) Higher levels of maintenance payable by high-earners.

In the past financial settlements were more commonly worked out on the basis of the "reasonable requirements" of the less well-off spouse, rather than an entitlement to a share of capital or income.

Who might benefit from a Pre-Nup?

The people who are most likely to want to enter into a PMA, and who are most likely to benefit from one, are those:

- (a) Who are marrying for the second time, where each of the parties want to preserve assets for children from their first marriages;
- (b) Who wish to protect inherited wealth;
- (c) Who have accumulated substantial assets before the marriage and wish those assets to be ring-fenced in the event of a future divorce;
- (d) Who have connections with another country, or who have assets outside the UK.

Where there is a substantial imbalance of wealth between the parties, it follows that the party in the weaker financial position will have less interest in entering into such an agreement.

What clauses go in a Pre-Nup?

There is no standard format. The contents of the document depend upon the assets and the objectives.

The types of PMA that we negotiate most regularly are:

- (a) agreements which seek to limit financial provision to "reasonable requirements" rather than a share of assets or income;
- (b) agreements setting out which assets will be treated as "marital assets" for division in the event of divorce, and which ones will be "non-marital assets" left out of account;

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX
Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400

Chancery Exchange, 10 Furnival Street, London EC4A 1AB
Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266

www.burges-salmon.com

Burges Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is regulated by the Solicitors Regulation Authority. A list of members, all of whom are solicitors, may be inspected at our registered office: One Glass Wharf, Bristol BS2 0ZX.



(c) agreements which ring-fence particular assets such as shares in a company or property held in a family for generations.

Practicalities

To have the greatest chance of being upheld in a future divorce settlement, it is strongly recommended that the following steps are taken when a PMA is negotiated:-

- (a) There must be an exchange of financial information so that both parties know the background to the document that they are being asked to sign;
- (b) Each party should have independent advice from a solicitor. This is normally achieved by the parties agreeing in advance what form they want the agreement to take. The document is drawn up by one solicitor, and the other party takes advice from another solicitor about the terms of the agreement before it is signed.

Timing

An agreement which is entered into at the last minute, under pressure, is unlikely to carry the same weight as an agreement that has been negotiated and signed well in advance.

It is therefore strongly recommended that the process is started well before the marriage takes place. Ideally, it should be signed at least a month before the date of the marriage.

What about Post-Nups?

An agreement entered into after a marriage can be used as an alternative to a PMA. However the incentive for both spouses to enter into such an agreement may not be there, once the marriage has taken place.

European/foreign dimension

If one of the parties to the marriage has a connection with another country, we may recommend that the primary contract should be drawn up in that country, possibly with a supplemental contract in England.

In mainland Europe it is standard to have a pre-marital contract. The contract will determine the matrimonial property regime that will apply during the marriage, on divorce, and on death. Broadly the choice is between "separation of property" in which each spouse owns their own property independently, and "community of property" in which there is a presumption that property in the marriage will be shared.

If there are connections with multiple jurisdictions, we may recommend a series of contracts to ensure that the desired result is achieved, to cover the possibility of residence and/or divorce or death in another country.

Outcome on death of a spouse – making new Wills

Under English law, marriage automatically revokes any existing Will.

It is therefore essential that both husband and wife should, on marriage or immediately before marriage, make a new Will.

The terms of a Will can however be overturned under the Inheritance (Provision for Family and Dependants) Act 1975, if the Will does not make proper financial provision for the surviving spouse.

A PMA can also be used to attempt to influence the outcome of claims on death under that Act.

A word of caution

Pre-Nups are not for everyone. They require a frank discussion about the possibility of a future separation or divorce, just at the time when the marriage is being planned. They also require a commitment to disclosing financial circumstances to the other spouse.

Discussion about a possible PMA should therefore be started in good time, in order to establish whether both are willing to go ahead.

What are the alternatives?

In the broadest terms, the alternatives to a PMA which might be considered are:

- (a) not getting married at all; the legal rights of people who live together are still very limited under English law;
- (b) in any event, making a Will to determine the outcome on death;
- (c) keeping property separate;
- (d) in some circumstances corporate or trust structures may also provide a degree of control.

Contact

Catherine Hallam, Partner, on 0117 939 2245 or email: catherine.hallam@burges-salmon.com

